No. 03-1627

SUPREME COURT, U.S.
FILED
2004
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In The
Supreme Court of the United States

MICHAEL T. HOWELL AND CHERI A. HOWELL,

Petitioners,

v.

HUGH RICCI, P.E., STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, AND PACIFIC RECLAMATION WATER COMPANY, A NEVADA CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

REPLY OF MICHAEL T. HOWELL AND CHERI A. HOWELL IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

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REPLY OF MICHAEL T. HOWELL AND CHERI A. HOWELL IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

I. The Respondents Present No Effective Response to the Violation of Due Process.

Neither the Respondents, Pacific Reclamation Water Company (Pacific Reclamation), nor the State Engineer attempt to refute the authorities advanced by the Petitioners (the Howells) that:

> (a) Published notice to the Knudsens violates the due process clause of the Fourteenth Amendment as interpreted by *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), and other cases cited by the Howells.
>
> (b) The decision of Nevada's State Engineer to divest the Knudsens of their water rights violates due process of law, because it was a collateral taking in excess of his statutory authority, and therefore void. See *Noble v. Union River Logging Co.*, 147 U.S. 165, 176 (1892).

Instead, Pacific Reclamation makes five arguments which it presumes will pre-empt the Constitutional issues. The State Engineer essentially joins in the first three of these arguments.

1. The Nevada State Engineer Was Prevented by Statute from Confirming the Hawks' Report of Conveyance Because of a Conflict in the Chain of Title.

This argument fails because it relies on bootstrap logic. If the State Engineer's decision deprived the Knudsens of their property without due process of law, it was

void and had no legal status or power to create any conflict in a chain of title. See e.g. *Noble, supra*; see also *Eldorado at Santa Fe, Inc. v. Cook*, 822 P.2d 672, 676 (N.M. 1991); *Bell v. Anderson*, 849 P.2d 350, 351 (Nev. 1993). Therefore the statute upon which the Respondents rely (NRS 533.382ff) does not pertain, and neither Pacific Reclamation nor the State Engineer nor the Supreme Court of Nevada may use it to sidestep the due process issues.

2. The Howells' Due Process Claims Are Procedurally Barred Under NRS 533.450.[1]

This is a statute of limitations argument, or statute of "repose" as Pacific Reclamation describes it. The State Engineer joins in this argument. The logical gap in this approach is that Pacific Reclamation assumes the State Engineer has jurisdiction to make all decisions. If the State Engineer's decision was without jurisdiction, it was also void, and the statute never commences to run. *Bogart v. Lathrop*, 523 P.2d 838, 840 (Nev. 1974); *Hilton v. Lincoln County*, 169 P.2d 329, 332 (Ore. 1946); see also *Crosby v. Bradstreet Co.*, 312 F.2d 483 (C.A. 2d 1963), *cert. den.*, 373 U.S. 911. Using Pacific Reclamation's logic, the State Engineer could have issued his decision with no prior notice, and the 30-day appeal statute would still run against the Knudsens. If Pacific Reclamation concedes that some notice was required before he made a decision, it must then argue that the State Engineer is bound only by Nevada statute, but not by the Constitution. Pacific Reclamation cites no case which elevates the State Engineer to such

[1] NRS 533.450 was NCL 1929 §7961 in 1944. It allows 30 days to appeal a decision. It does not require that the State Engineer give notice of his decision.

status. Finally, neither Respondent denies that the State Engineer was beyond his statutory authority in giving the Knudsens' rights to Pacific Reclamation.

3. The Reference to Due Process in the Order of Affirmance Is *Obiter Dictum.*

The State Engineer's version of this argument is that the Supreme Court of Nevada did not mean what it said. The Court said that it rejected the Howells' due process claim. According to the State Engineer, the Court meant that it "found it unnecessary to consider" the Howells' claim. (State Engineer brief p. 8). Pacific Reclamation simply labels the Court's due process language as "dictum."

Both arguments beg the issue. The issue is whether the level of attention devoted to due process by a lower court, controls review by the Supreme Court of the United States. If the lower court had ignored due process altogether, it still decided the case in a way that conflicts with the Fourteenth Amendment. Supreme Court Rule 10(c) therefore applies. Neither may a state court prevent the consideration of Constitutional questions by the Supreme Court, which had to be considered by the state court in order to reach its conclusion. 28 U.S.C. §1257; *Wilson v. Cook*, 327 U.S. 474, 480 (1946); *Honeyman v. Hanan,* 300 U.S. 14, 18 (1937). Whether Nevada's Supreme Court viewed the issues as dictum or failed to consider them at all, the Court was in error. Its error excused a taking of property without due process of law and must be corrected.

4. The Howells' Due Process Claims Are Barred Under the Statute of Limitations.

This argument has no more validity than the statute of limitations argument in Section 2 above. Regardless of Pacific Reclamation's speculation to the contrary, there is no evidence that the Knudsens were aware of the State Engineer's decision until their attorney wrote to the State Engineer in 1962. (App. 81). When they became aware is irrelevant in any event, because a victim's knowledge of a void act does not make it valid. No statute of limitations runs in its favor. See *Bogart* and *Hilton*, *supra*. This includes Nevada's NRS 11.220.

Pacific Reclamation hopes to deflect the impact of *Mullane*, by labeling its application to the case at hand retroactive. The Central Hanover Bank and Trust Company may have used the same argument in *Mullane*, but the effort was obviously unsuccessful. Neither can Pacific Reclamation claim equitable status of the sort advocated by Justice O'Connor through her dissent in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 (1993). Pacific Reclamation has demonstrated no injurious reliance upon the State Engineer's decision prior to 2000, when it was rewarded with a windfall for which it had paid nothing. Neither can Pacific Reclamation prove the loss of "valuable property rights" in the form of a statute of limitation which will never run.

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) is inapplicable. This is because the State Engineer failed to implement his decision until April, 2000. Neither Pacific Reclamation nor the State Engineer is in a position to argue that any "degree of finality" existed prior to that date. Likewise, while the State Engineer delayed implementation

of his decision for 55 years, Pacific Reclamation passively watched, and hardly merits remedial relief on grounds of finality. It is not as though Pacific Reclamation had been growing hay since 1944, using the Knudsen water right.

The foregoing discussion assumes that *Mullane* concepts are being retroactively applied to the State Engineer's decision. *Mullane* cites *Wuchter v. Pizzutti*, 276 U.S. 13 (1928), which itself provided satisfactory warning to the State Engineer of the importance of adequate notice.

Finally, Pacific Reclamation cannot apply its retroactivity argument to *Noble v. Union River Logging Co.*, *supra*. Pacific Reclamation does not even mention the case or address the issues which it presents. Pacific Reclamation therefore implicitly admits that the State Engineer had no power under NCL 1929 §7944, §7948, or §7970 to give away the Knudsens' water rights. (App. 38-44). Those rights had been adjudicated to the Knudsens' ranch by the State Engineer's predecessor, and confirmed by the Sixth Judicial District Court of Nevada in the Humboldt River Decree (App. 2, 87-88). *Kern River Co. v. United States,* 257 U.S. 147, 151-2 (1921), which cites *Noble*, holds that the federal government would be required to file a suit in equity to divest the owner of a right-of-way previously granted under federal law. *Noble* and *Kern* are Fifth Amendment cases, but their reasoning is applicable to state governments and the Fourteenth Amendment as well. *Heiner v. Donnan*, 285 U.S. 312, 326 (1932). Certainly the State Engineer had no statutory jurisdiction to divest the Knudsens' water rights under Nevada statutes which specifically prohibit the impairment of vested rights. (App. 44).

5. The Howells Lack Standing to Raise Their Procedural Due Process Claims.

Pacific Reclamation's final effort is its contention that the Howells lack Article III and prudential standing to assert their claim. The Howells have no disagreement with the case law cited by Pacific Reclamation. Using the plain and ordinary meaning of the case language, the Howells meet all requirements for Article III standing. The State Engineer cut off the water to the ranch when the Howells were its owners. To paraphrase *Northeastern Florida Chapter of A.G.C.A. v. City of Jacksonville*, 508 U.S. 656, 663-64 (1993), as of April 2000, the Howells suffered an invasion of their property rights which was concrete, particularized and actual, resulting in injury directly traced to the conduct of the State Engineer. This injury may be readily redressed by return of the water right, and the water that goes with it, to the Howells. If Pacific Reclamation does not comprehend the invasion and subsequent injury, it will feel no loss when the rights are returned to their rightful owners.

In its brief (p. 26) Pacific Reclamation states, without referring to any evidence, that "the Howells purchased their real property many years later knowing full well that the water rights at issue in this case had been previously taken off the property." This unsupported statement falsely presumes that the Howells had the same view of due process as Nevada's courts. It is also contradicted by the finding of Nevada's Supreme Court that the Howells fought to have their chain of title recognized. (App. 3-5).

As far as prudential standing is concerned, the case cited by Pacific Reclamation, *Singleton v. Wulff*, 428 U.S. 106 (1976), resolves the issue. The Howells now own the

ranch. Pacific Reclamation presents no evidence, and there is nothing in the record to indicate that any prior owner had reserved the water rights in question. This is to say that all of these water rights were passed by the Knudsens to the Howells through mesne conveyance. There are no third parties holding rights pertinent to this case. See *Singleton*, pp. 113-14.

Without citing a case to support the proposition, Pacific Reclamation argues that the right to challenge the State Engineer's decision was personal to the Knudsens. The legal reality is that the decision was void, and it was subject to collateral attack. The failure of the first victim to attack it does not mean that it has risen from the dead. Although the facts of the case at hand do not require it, it is certainly arguable that imposition of a standing prerequisite improperly ascribes validity to a void act. *cf. Canal Insurance Co. v. Cambron*, 242 S.E. 2d 32, 36 (Ga. 1978), *cert. den.*, 439 U.S. 805.

II. Conclusion

The Howells' case is a perfect example of the reason for the Fourteenth Amendment. They have lost their water rights because of a state agency decision rendered without jurisdiction and premised upon inadequate notice. The

Respondents have presented no effective response. The Howells' Petition for Certiorari should be granted.

Respectfully submitted,

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